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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PRIVATE FIRST CLASS,
United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether a military commander, who is charged with the administration of justice in his unit, can provide a "neutral and detached" judicial review of pretrial confinement proceedings as required by the Fourth Amendment to the United States Constitution and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

II

Whether the Court of Military Appeals violated the doctrine of separation of powers under the United States Constitution when it impermissibly interfered with the power of the President of the United States to establish a pretrial confinement review scheme in Rule for Courts-Martial 305(i) under the mandate of *Gerstein v. Pugh*, 420 U.S. 103 (1975).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Wesley M. Rexroat, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 38 M.J. 292 (C.M.A. 1993) (Appendix A). The opinion of the United States Army Court of Military Review is reported at 36 M.J. 708 (A.C.M.R. 1992) (*en banc*), (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

> *Article I, Section 1.* All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> *Article I, Section 8.* The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court . . . To raise and support Armies . . . To make Rules for the Government and Regulation of the land and naval Forces . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .
>
> *Article II, Section 1.* [1] The executive Power shall be vested in a President of the United States of America.
>
> *Article II, Section 2.* [1] The President shall be Commander in Chief of the Army. . . .
>
> *Amendment IV.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 27 and September 16, 1991, Private First Class [hereinafter PFC] Rexroat was tried at Schofield Barracks, Hawaii, by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] Private First Class

[1] Court-martial members are analogous to jurors.

Rexroat pled guilty and was convicted of attempted larceny, two counts of absence without leave, and forty-one counts of uttering checks without sufficient funds, in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] arts. 80, 86 and 123a, 10 U.S.C. §§ 880, 886 and 923a (1982), respectively. The jury sentenced PFC Rexroat to a bad-conduct discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence.[2]

At trial, PFC Rexroat asserted that he was not afforded the prompt judicial determination of whether there was probable cause to justify extended pretrial confinement following his warrantless arrest because the determination, although conducted within forty-eight hours, was made by a military commander. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991). Private First Class Rexroat contended that a judicial determination had to be made by a military magistrate.[3] Manual for Courts-Martial, United States, 1984 [hereinafter M.C.M., 1984], Rule for Courts-Martial [hereinafter R.C.M.] 305(i). The military judge found that the military commander who conducted the pretrial confinement review, Lieutenant Colonel Randall, was a neutral and detached magistrate for purposes of the *McLaughlin* review.

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[2]The commanding general, who initially convenes the court-martial, is also the accused's first avenue of appeal and clemency.

[3]A military magistrate is a judge advocate appointed by The Judge Advocate General of the Army. The Military Magistrate Program is "an Army-wide program for review of pretrial confinement and the issuance of search and seizure authorizations, on probable cause, by neutral and detached magistrates." Military magistrates are judge advocates "empowered to direct the release of persons from pretrial confinement . . . on a determination that continued confinement does not meet legal requirements. . . ." Chapter 9, Army Regulation 27-10, *Military Justice*, Headquarters, Department of the Army, Washington, D.C., (22 December 1989). (Appendix D.)

On September 22, 1992, a three-judge panel of the United States Army Court of Military Review [hereinafter Army court] held that *McLaughlin* and R.C.M. 305(i) require that a military magistrate review a commander's pretrial confinement order within forty-eight hours of apprehension and subsequent confinement. The panel found that the President's intent in promulgating R.C.M. 305(i) was to comply with the requirements of *Gerstein*.

The government petitioned for *en banc* reconsideration on October 14, 1992; PFC Rexroat opposed the petition. The Army court granted reconsideration *en banc* on October 28, 1992, and affirmed its original holding on December 8, 1992. (Appendix B.) In the interim, the other service courts adopted the holding of the original panel in *Rexroat*. *United States v. Holloway*, 36 M.J. 1078 (N.M.C.M.R. 1993) (*en banc*); *United States v. Williams*, ___ M.J. ___ (A.F.C.M.R. 31 August 1993).

On January 6, 1993, at the request of the government, The Judge Advocate General of the Army certified three issues to the United States Court of Military Appeals pursuant to U.C.M.J. article 67(a)(2). The United States Court of Military Appeals, on September 29, 1993, reversed the Army court's decision. The Court of Military Appeals held that a neutral and detached commander could make the *Gerstein* probable cause determination and, if completed within forty-eight hours, the review would satisfy *McLaughlin*. (Appendix A.)

REASONS FOR GRANTING THE WRIT

This case presents the questions of whether the lower court's decision (1) deprives servicemembers subject to warrantless arrest and pretrial confinement of the protections of the Fourth Amendment guaranteed to nonmilitary citizens and (2) impermissibly usurps the Congressionally-delegated power of the President to establish procedures which comport with

the requirements of the Fourth Amendment under *Gerstein* and *McLaughlin*.

Facts

PFC Rexroat was arrested and detained at the Navy brig at Pearl Harbor, Hawaii, on June 26, 1991. He remained in custody until his commander ordered him into pretrial confinement on June 27, 1991. On June 28, 1991, within forty-eight hours of the warrantless arrest and confinement, a commander outside PFC Rexroat's chain of command, Lieutenant Colonel [hereinafter LTC] Randall, conducted what the government contends was a probable cause review of PFC Rexroat's pretrial confinement and determined that continued confinement was justified.[4] On July 3, 1991, PFC Rexroat's commander reviewed his decision to place PFC Rexroat into pretrial confinement and prepared a memorandum setting out his reasons for continuing the confinement.[5] On the same day, seven days after PFC Rexroat's confinement began, a military magistrate conducted a pretrial confinement review and determined that continued confinement was warranted.[6]

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[4] From the record of trial, (R. at 187), LTC Randall's probable cause review consisted of a briefing by someone from the prosecutor's office followed by his decision to retain PFC Rexroat in confinement. It is unlikely that this Court's opinions in *Gerstein* and *McLaughlin* contemplated such a procedure.

[5] R.C.M. 305(h) requires that the commander of the person in pretrial confinement review the confinement within 72 hours and if pretrial confinement is continued, prepare a memorandum setting out the reasons for the decision to continue confinement.

[6] Under the Rules for Courts-Martial, failure to provide the required prompt judicial review mandated by *Gerstein* and *McLaughlin* subjected PFC Rexroat to five days of illegal pretrial confinement for which he is entitled to credit against his sentence to confinement. Even if PFC Rexroat should complete serving his sentence before this appeal is complete, he would be entitled to the return of the equivalent of five days

Gerstein and McLaughlin

This Court expanded its view of Fourth Amendment seizure protections to include pretrial confinement in *Gerstein*, declaring that "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the *Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.*" *Gerstein*, 420 U.S. at 114 (emphasis added). This review must be done promptly after the accused has been apprehended and placed into confinement. *Id.* The person conducting the review must be neutral and detached, and cannot have a prosecutorial or law enforcement role. *Id.* at 112, 118; and *accord, Johnson v. United States*, 333 U.S. 10 (1948); and *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). The Court of Military Appeals found *Gerstein* applicable to the military in *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). In 1984, the President, in promulgating R.C.M. 305(i) to be the *Gerstein* review, determined that the review "shall be made by a neutral and de-

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of forfeited pay and allowances as recompense for the five days of illegal confinement. The issues in this case are not moot.

Additionally, as this Court noted in *Gerstein*:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'

Gerstein 420 U.S. at 110, n.11.

Finally, it should be noted that there is no established procedure in the military justice system of appeals to certify PFC Rexroat as a representative of a class.

tached officer appointed in accordance with regulations prescribed by the Secretary concerned [i.e., the Army Military Magistrate Program]." R.C.M. 305(i); M.C.M., 1984, R.C.M. 305(i) analysis, App. 21 at A21-16 to 17; AR 27-10. In *McLaughlin*, this Court articulated its belief that if the *Gerstein* review is done within forty-eight hours of arrest and confinement it will normally meet the promptness requirement. *McLaughlin*, 111 S. Ct. at 1670.

The Issues

Judicial Determination by a Neutral and Detached Magistrate

The key issue in this case is whether a probable cause determination by a military commander provides the Fourth Amendment protection of a judicial review by a neutral and detached magistrate contemplated by this Court. Impacting on this issue is the fact that the Presidentially-established procedures for review of pretrial confinement authorize **only** military magistrates to make the probable cause determination.

The meaning of neutral and detached is well settled. In *Shadwick, supra*, this Court addressed the constitutionality of clerks of the municipal court issuing arrest warrants for violations of city ordinances. The opinion provides an overview of this Court's past decisions and defines the neutrality and detachment required of a "judicial officer" or "magistrate."

> Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. . . . [no] affiliation . . . with prosecutors or police. . . . [no] connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires. . . . [the clerk in this case is] removed from

> prosecutor or police and works within the judicial branch subject to the supervision of the . . . judge.

Id. at 350-351.

This standard is clear and has normally been followed by the Court of Military Appeals. In 1982, the court opined that only military judges, military magistrates, or officers who were not involved in law enforcement could serve as pretrial confinement reviewers. *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982). In *Lynch*, the court found that both the staff judge advocate and the brigade commander were disqualified from serving as reviewers, noting that the former is the chief prosecutor under *United States v. Harlin*, 7 M.J. 399 (C.M.A. 1979),[7] and the latter is involved in a law enforcement role under *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). *Lynch*, 13 M.J. at 396-397, 397 n.2.

It is well settled that commanders are "law enforcement officials" within the command. *See United States v. Ezell*, 6 M.J. at 317-318 ("Indeed, no official in the civilian community having similar combined functions [as the military commander does] could qualify as a neutral and detached magistrate under Fourth Amendment jurisprudence."), and *Stuckey*, 10 M.J. at 359 ("A military commander has responsibilities for investigation and for law enforcement that a magistrate does not possess.") and at 361 ("It seems perfectly clear that a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate. . . .' "). *See also United States v. Sharrock*, 32 M.J. 326, 333 (C.M.A. 1991) (S.J. Everett, concurring in part and dissenting in part) (*citing with approval, Stuckey*, 10 M.J. at 361) ("A commanding officer cannot be equated to a magistrate. . . ."); M.C.M., 1984, R.C.M. 305 analysis, App.

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[7] *See also Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022 (1971) (individuals who perform prosecutorial functions cannot be neutral and detached magistrates for purposes of the Fourth Amendment).

21 at A21-15.[8] The Court of Military Appeals' decision in this case that commanders can act as neutral and detached magistrates under the Constitution to conduct a *Gerstein* judicial review is at odds not only with these prior rulings[9] but with this Court's language in *Shadwick*. *Shadwick* makes it clear that neutral and detached means that the person's **position** is neutral and detached from law enforcement and prosecution, **not** that the person is neutral and detached from a particular case. The Court of Military Appeals' interpreta-

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[8] *United States v. Lynch, supra*, held that officials with a law enforcement function are precluded from serving as magistrates. Commanders, according both *Ezell* and *Stuckey*, inherently function in those roles. Hence, *Lynch* concluded that the special court-martial convening authority, a brigade *commander*, was *per se* disqualified from being a magistrate for purposes of *Gerstein*. 13 M.J. at 296-97.

[9] The opinion is based on a misunderstanding of the purpose of the various procedures established under R.C.M. 305, (Appendix C), and fails to address the impact of the decision in several critical areas. First, the court fails to explain how "the commander's initial probable-cause determination under RCM 305(d)" can satisfy *Gerstein* when that determination is the one which places the accused into pretrial confinement and is made by the commander acting in a law enforcement role. Second, in holding that the seventy-two hour review *by the confinee's commander* mandated by R.C.M. 305(h) would satisfy *Gerstein* "if the commander is neutral and detached," the court again fails to explain under what circumstances a commander can be neutral and detached while reviewing his or her own decision to confine a soldier. Next, the court fails to explain what authorizes a commander outside the chain of command, as occurred in this case, to conduct the review under R.C.M. 305(h) when the plain language of the rule requires that it be done by the commander of the prisoner. Finally, the decision fails to take into account the fact that a commander outside the chain of command, LTC Randall in this case, has no authority to release a pretrial confinee. R.C.M. 305(g) authorizes only the commander of the prisoner, the person authorized to conduct the R.C.M. 305(i) review [a military magistrate] and, once charges have been preferred, the military judge, to direct release from confinement. In fact, releasing a prisoner without authority is an offense under U.C.M.J. art. 96, 10 U.S.C. § 896.

tion of "neutral and detached" is akin to one which would allow police precinct commanders in the civilian community to serve as magistrates in neighboring precincts.

The Court of Military Appeals reached its decision in this case based upon the rationale in its previous decisions regarding whether a commander could be neutral and detached in granting a search authorization under presidential authority. The court found "no reason" to treat pretrial confinement probable cause determinations any differently than those involving searches. *See generally, Ezell, supra.* The court reasoned, in essence, that because a commander can be neutral and detached for the probable cause determination in search cases, he can be neutral and detached for the purposes of pretrial confinement reviews. This analogy is flawed.

In *Ezell,* the Court of Military Appeals declined to find commanders *per se* disqualified to act as neutral and detached magistrates for search authorizations. It ruled that there was a special exception to the Fourth Amendment's "neutral and detached magistrate" requirement which allowed commanders to grant search authorizations; namely, specific presidential authority pursuant to Manual for Courts-Martial, United States, 1969, Paragraph 152, now M.C.M., 1984, Military Rule of Evidence 315. In this case, however, there is no analogous special exception. In fact, the President, by delegation of authority to the Secretary of the Army, specifically designated military magistrates, not commanders, to review pretrial confinement. Following the precedent of the search cases, therefore, the Court of Military Appeals should have deferred to Presidential authority and applied R.C.M. 305(i).

In *Stuckey,* another search case relied on by the court, the Court of Military Appeals recognized that a commander's authority to grant search authorizations has never been equated with the judicial determination which comes within the contemplation of the warrant clause of the Fourth Amendment. *Stuckey,* 10 M.J. at

360; *see also Gerstein*, 420 U.S. at 114. "It seems perfectly clear that a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense." *Stuckey*, 10 M.J. at 361. Instead, the constitutionality of a commander's authority to grant search authorizations rests solely on the reasonableness of such a search within the context of military society. *See United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992), *citing Goldman v. Weinberger*, 475 U.S. 503 (1986).

Review of the pretrial confinement of military personnel offers no unique circumstances or military custom requiring distinction from civilian society. The commander need not stop and seek judicial approval before confining a soldier but may do so upon determining the existence of probable cause. Soldiers in pretrial confinement are generally confined in facilities where there is easy access to a military magistrate who can perform the *Gerstein* review. Moreover, those rare circumstances in which military exigencies prohibit a military magistrate from reviewing the pretrial confinement of a soldier within forty-eight hours simply support departure from the forty-eight hour ceiling of *McLaughlin*, 111 S.Ct. at 1670. They do not justify abandoning the call for judicial review.

The President's *Gerstein* review under R.C.M. 305(i) can be performed any time after confinement. Accordingly, those completed within forty-eight hours satisfy the mandate of *McLaughlin*. Those occurring after forty-eight hours without articulated exigencies do not meet the *McLaughlin* mandate. Instead of applying this simple standard, the Court of Military Appeals misapplied the mandate of this Court in *Gerstein* by endorsing a "non-judicial" review of pretrial confinement. The court's apparent disregard of the clear intent of the President in establishing a *Gerstein* review under R.C.M. 305(i)[10] violates the doctrine of separation of powers.

[10] Petitioner notes that the qualifications of military magistrates under the Army Military Magistrate Program are in accord with the qualifications for federal magistrates under 28 U.S.C. 631 *et seq.*, and, therefore,

Had the Court of Military Appeals followed the rationale advanced by its own opinions, it would have determined that PFC Rexroat was illegally confined for five days and affirmed the Army court's opinion. Instead, it disregarded its own case law and invalidated the President's clear intent in violation of the doctrine of separation of powers.

Separation of Powers

The concept of separation of powers lies at the very heart of our republican form of government. In the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court held that the President of the United States could not seize and operate the nation's steel mills for in doing so he was acting in the capacity of a lawmaker. It is the role of Congress, not the President, to make laws. As a result, this Court found that the President's actions violated the doctrine of separation of powers. *See also New York v. United States*, 112 S.Ct. 2408 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another. . . ."); *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

This Court held in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), that one branch can delegate power to another branch, but the delegation is limited and controlled by the delegating branch. *See also Mistretta v. United States*, 488 U.S. 361 (1989).

The United States Constitution grants Congress power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST., art. 1, § 1. Under this constitutional authority, Congress passed the Uniform Code of Military Justice. 10 U.S.C. § 801 (1950, 1982). Under

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military magistrates could serve as judicial officers within the meaning of *Gerstein*.

U.C.M.J., art. 36, Congress delegated to the President limited powers to implement the Code. Specifically, the President was given the Congressional power to proscribe "[p]retrial, trial, and post-trial procedures." U.C.M.J., art. 36.[11] The United States Court of Military Appeals has recognized that the President has authority to promulgate Rules for Courts-Martial under article 36 and that the courts cannot usurp the powers delegated to the President by adjudicating rules that are at odds with those established by the President. For this reason, in *United States v. Mathews*, 16 M.J. 354 (C.M.A. 1983), the court held that although the existing Rule for Courts-Martial governing the sentencing phase of capital trials was unconstitutional, it could not enact a new one in its place. In this case, the Court of Military Appeals, while not finding the review scheme of R.C.M. 305 unconstitutional, ruled that persons not authorized by the President to conduct probable cause reviews or to release pretrial prisoners from confinement could in fact conduct the judicial review under *Gerstein*. This interference with the Presidential scheme oversteps the bounds of the court's authority and violates the separation of powers. With this decision, the Court of Military Appeals has taken a path as misguided as that taken by the Ninth Circuit in *McLaughlin*.[12]

The power to establish the rules governing pretrial confinement review procedures belongs to the President alone. In reaching its decision in this case, the court usurped that power and essentially legislated a new type of review by a person not specifically authorized to conduct any of the re-

[11] Amendments to Article 36 were passed as a part of the Defense Authorization Act, Pub. L. No. 96-107, 96th Cong., 1st Sess. (Nov. 1979).

[12] In *McLaughlin*, the Ninth Circuit overruled legislative intent and the intent of *Gerstein* when it divided up the County of Riverside's combined pretrial confinement reviews. 111 S.Ct. at 1668-69.

views contemplated by the President. In doing so, the court below ignores the clear guidance of *Gerstein* that "[t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States." *Gerstein*, 420 U.S. at 123. The Court of Military Appeals decision struck down the purpose of R.C.M. 305(i). The Court of Military Appeals has no power to make law or to enforce it, and the court is not empowered to change the *Gerstein* review from R.C.M. 305(i) to R.C.M. 305(d) or any other new procedural invention. The decision of the Court of Military Appeals violates the doctrine of separation of powers.

CONCLUSION

The petition for certiorari should be granted. *Gerstein* and *McLaughlin* require a prompt judicial determination of probable cause by a neutral and detached magistrate to continue pretrial confinement following a warrantless arrest. The Court of Military Appeals has so far eroded the procedures established by the President to ensure the Fourth Amendment protections of *Gerstein* as to make them meaningless. The resulting procedures do not meet the constitutional requirements of the Fourth Amendment and constitute an impermissible interference with the President's power to establish a reasonable system of review under *Gerstein* and *McLaughlin*. The questions presented by this case are substantial and have no other means of redress besides this Court.

Respectfully submitted,

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